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#### Recommended Citation

Brooke D. Coleman and Elizabeth G. Porter, Reinvigorating Commonality: Gender & Class Actions, 92 *N.Y.U. L. Rev.* 895 (2017).

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# REINVIGORATING COMMONALITY: GENDER AND CLASS ACTIONS

BROOKE D. COLEMAN<sup>†</sup> & ELIZABETH G. PORTER<sup>‡</sup>

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## INTRODUCTION

The modern class action, the modern feminist movement, and Title VII of the Civil Rights Act of 1964 were all products of the creativity and turmoil of the 1960s. As late as 1961—one year after Justice Felix Frankfurter rejected new law school graduate Ruth Bader Ginsburg as a law clerk because she was a woman<sup>1</sup>—the Supreme Court unanimously upheld the constitutionality of a Florida statute that required men, but not women, to serve on juries, on the ground that women’s primary role was in the home.<sup>2</sup> As Betty Friedan put it in 1963’s *The Feminine Mystique*, “In almost every professional field, in business and in the arts and sciences, women are still treated as second-class citizens.”<sup>3</sup> But change was imminent. The Equal Pay Act of 1963,<sup>4</sup> Title VII of the Civil Rights Act of 1964,<sup>5</sup> the founding of the

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<sup>1</sup> See Neil A. Lewis, *The Supreme Court: Woman in the News; Rejected as a Clerk, Chosen as a Justice: Ruth Joan Bader Ginsburg*, N.Y. TIMES (June 15, 1993), <http://www.nytimes.com/1993/06/15/us/supreme-court-woman-rejected-clerk-chosen-justice-ruth-joan-bader-ginsburg.html>.

<sup>2</sup> *Hoyt v. Florida*, 368 U.S. 57, 58 (1961) (upholding murder conviction by an all-male jury of woman who killed her husband).

<sup>3</sup> Betty Friedan, *THE FEMININE MYSTIQUE* 508 (Norton ed. 2001) (1963).

<sup>4</sup> 29 U.S.C. § 201 (2012).

<sup>5</sup> See 42 U.S.C. § 2000e-2(a)(1) (2012) (making it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his

ACLU Women's Rights Project,<sup>6</sup> and a rising social and intellectual feminist movement brought women's equality into the national conversation.<sup>7</sup> Simultaneously—at least in part in response to the civil rights movement and the Civil Rights Act<sup>8</sup>—an (all-male) Judicial Conference<sup>9</sup> and Supreme Court in 1966 ushered in the modern era of collective litigation by promulgating Federal Rule of Civil Procedure 23, and more specifically, Rule 23(b)(2), which provided a formal structure for civil rights plaintiffs to seek aggregate relief for violations of federal and state anti-discrimination laws.<sup>10</sup> Together, these phenomena gave impetus to communities of women to combat legal and cultural injustices through the courts. The result has been widespread improvement in the lives of working women—and men—across many industries.<sup>11</sup>

In this Article, we examine the interplay of Rule 23(b)(2) class actions, feminism, and Title VII sex discrimination doctrine over the past fifty years to show that the theoretical concept of commonality—cohesion, unity—in the women's movement has had a significant impact on the ability of women to seek collective redress for workplace discrimination through class actions. We describe how the four “waves” of feminism since the 1960s find corresponding analogues in the development of Title VII class action law. Beginning in the civil rights era, feminism became an entrenched part of mainstream Amer-

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compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex”).

<sup>6</sup> Lenora M. Lapidus, *30 Years of Women's Rights Litigation: An Evolving Constitutional Standard of Review*, 23 WOMEN'S RTS. L. REP. 237, 241 (2002) (referencing the founding of the ACLU Women's Rights Project, founded “by Ruth Bader Ginsburg in 1971”).

<sup>7</sup> DOROTHY SUE COBBLE ET AL., *FEMINISM UNFINISHED* 71 (2014) (naming the feminist movement the largest social movement in the nation).

<sup>8</sup> See Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293, 294 (2014) (noting influence of desegregation cases on rulemakers); see also David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 599–601 (2013) (noting that rulemakers “appreciated the contribution the class action had made, as a substitute for government enforcement, to the desegregation cause”).

<sup>9</sup> See Fed. Judicial Ctr., Judicial Conference of the United States: Members, <https://www.fjc.gov/history/administration/judicial-conference-united-states-members> (last visited Sept. 1, 2017) (listing all members of the Judicial Conference and their dates of service).

<sup>10</sup> FED. R. CIV. P. 23(b)(2); 1 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 1:15, at 38–39 (5th ed. 2011) (“Congress enacted the amended Rules 23 in 1966 following the typical rules adoption process.”).

<sup>11</sup> See Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1009 (2015) (“Who would have imagined the law addressing single-sex hiring, sex-plus discrimination, disparate impact discrimination, affirmative action, sex stereotyping, same-sex harassment, caregiver discrimination, discrimination based on gender identity, and, within the foreseeable future, sexual orientation?”).

ican culture. Over time, however, feminism's influence waned as critics from within and without the movement attacked fundamental tensions inherent in the feminist project and as so-called identity politics fell out of fashion.<sup>12</sup>

Class actions underwent a parallel evolution. They gained legitimacy and momentum through the early 1980s, as judges became increasingly comfortable with Rule 23's flexibility and potential efficiencies.<sup>13</sup> Yet even as class actions became a conventional part of the litigation landscape, a backlash took hold as courts and scholars began to question the ways in which class actions warp the traditional incentive structures of litigation.<sup>14</sup> In 2011, these interrelated legal and social challenges collided in the Supreme Court's decision in *Wal-Mart v. Dukes*<sup>15</sup>, which reversed the certification of a class of 1.5 million women employed by Wal-Mart alleging sex discrimination under Title VII. If Rule 23(b)(2) and Title VII together opened a door to enforcement of women's rights at work, in some ways *Wal-Mart* is a partial closing of that door.

This is not an empirical study, nor is it comprehensive. Rather, our aim is to generate thought as to ways in which class action doctrine simultaneously reflects and reinforces evolving views of feminism and gender equality. We acknowledge that class actions are not the sole standard bearers for impact litigation, and that individual suits—whether brought by individuals of any gender or by physicians—have been vital to the establishment of anti-discrimination legal norms in the area of gender equality.<sup>16</sup> Even so, we argue that

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<sup>12</sup> See, e.g., Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 622 (1990) ("How can [feminist legal] critics build a unified political and analytical stance from women's varying perceptions of their varying experiences? And what entitles that stance to special authority?").

<sup>13</sup> See generally David Marcus, *The History of the Modern Class Action, Part II: Litigation and Legitimacy, 1981-1994*, 86 FORDHAM L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015581](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015581).

<sup>14</sup> See *id.* (manuscript at 13).

<sup>15</sup> 564 U.S. 338 (2011).

<sup>16</sup> In many instances, individual suits—and not class actions—have more effectively disrupted legal regimes in ways that advance gender equity. See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (holding that individual may show disparate treatment under Pregnancy Discrimination Act by making out prima facie case of discrimination similar to Title VII case); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding unconstitutional laws limiting marriage to one man and one woman, a traditional definition that frequently relegated women to subordinate status in the home); *Reed v. Reed*, 404 U.S. 71 (1971) (holding that Idaho statute compelling preference for assigning men over women who are equally entitled to administer estates of the deceased was arbitrary and violated Equal Protection Clause); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that the Civil Rights Act of 1964 does not permit different sets of hiring policies for men and women).

Rule 23(b)(2) suits continue to serve a vital function by allowing women to enforce those established norms, overcoming classic barriers to judicial justice such as lack of resources, lack of access to lawyers, and retaliation by employers against individuals who file suit.<sup>17</sup> As Anita Hill recently argued in a critique of the technology sector, “Class action lawsuits can force industry-wide change, even in the most entrenched, male-dominated industries.”<sup>18</sup>

Or at least, they could, at one point. The continuing trend toward tightening certification requirements, minimizing reliance on statistics, and shunting suits into individualized arbitration threatens to undermine the enforcement function that is central to Rule 23(b)(2).<sup>19</sup> Finally, we conclude by noting the relative decline of feminist legal theory over the past 20 years, particularly but not only in the field of civil procedure.<sup>20</sup> Feminist criticism, perhaps due to its association with identity politics, has waned.<sup>21</sup> Yet the questions raised in *Wal-Mart*—of commonality and individualism, of structural discrimination and discretion, and of equality and accommodation of difference—remain central theoretical problems for today’s women. As the 2016 presidential campaign and the 2017 Women’s March on Washington—the largest single-day social protest in the history of the United States<sup>22</sup>—show, sex discrimination is not a relic of the past.

<sup>17</sup> See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777, 799–804 (2016) (creating a typology of cases that must be resolved through class actions in contrast to cases where an individual suit might achieve a similar result).

<sup>18</sup> Anita Hill, *Class Actions Could Fight Discrimination in Tech*, N.Y. TIMES (Aug. 8, 2017).

<sup>19</sup> See *infra* notes 85–98 and accompanying text.

<sup>20</sup> The modern heyday of feminist civil procedure scholarship was during the early 1990s and was largely led by scholars like Elizabeth Schneider and Judith Resnik. See, e.g., Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993) (discussing critical ways in which gender influences procedure). Schneider and Resnik have continued some of this work. See, e.g., Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007). With a few exceptions, not many other current feminist scholars have taken up the issues of how gender intersects with procedure. See, e.g., Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (studying the problems of resolving hostile work environment claims at summary judgment); Danya Shocair Reda, *Critical Conflicts Between First-Wave and Feminist Critical Approaches to Alternative Dispute Resolution*, 20 TEX. J. WOMEN & L. 193 (2011) (considering the differences between feminist and first-wave critical responses to alternative dispute resolution); Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 TEX. J. WOMEN & L. 1 (2000) (discussing the impact of procedure on women and, more specifically, the poor).

<sup>21</sup> See, e.g., MARK LILLA, *THE ONCE AND FUTURE LIBERAL* (2017) (arguing that identity politics has weakened and almost destroyed liberalism).

<sup>22</sup> See Jeremy Pressman & Erica Chenoweth, *Compilation of Women’s March Crowd Size Estimates*, [https://docs.google.com/spreadsheets/d/1xa0iLqYKz8x9Yc\\_rfhmSOJQ2EGgeUVjvV4A8LsIaxY/htmlview?sle=true&gid=0](https://docs.google.com/spreadsheets/d/1xa0iLqYKz8x9Yc_rfhmSOJQ2EGgeUVjvV4A8LsIaxY/htmlview?sle=true&gid=0) (last visited Sept. 9, 2017) (estimating

Feminism continues to be not only relevant, but vital, and legal scholars should renew their focus on feminist theory and other issues relating to sex discrimination.

## I

### THE WAVES OF FEMINISM & CLASS ACTIONS

Beginning in the 1960s, the waves of feminism and the evolution of class action doctrine behave like plot lines on a chart, sometimes intersecting and other times moving away from each other. This section briefly describes that evolution. It will first trace the four periods, or waves, of feminism and feminist thought. It will then show how theoretical and political debates about whether gender is an essential difference that deserves legal recognition played out in the context of class actions, which were evolving in analogous stages.

#### A. *Waves of Feminism*

Although it is difficult to confine diffuse social movements within narrow time periods, scholars and activists describe four periods, or waves, of American feminism—or at least three and a half.<sup>23</sup> The first, which is often dated to the Seneca Falls Convention in 1848,<sup>24</sup> sought fundamental legal rights for women: the right to vote, to own property, and to have custodial rights over children.<sup>25</sup> This groundbreaking phase of American feminism took place without the benefit of either the Civil Rights Act or of Rule 23. Beginning with the establishment of a birth control clinic in 1916 by Margaret Sanger, this wave of femi-

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that between 3,267,134 and 5,246,670 people participated in a Women's March in D.C. or elsewhere in the United States, not including international marches).

<sup>23</sup> For an excellent and recent history of American feminism, including a description of the four periods, or waves, of feminism, see generally COBBLE ET AL., *supra* note 7. In keeping with the deconstructionist strain central to feminism, the term “wave” has been criticized for its American-centric view of feminism, and for its failure to demarcate progress over time. See SHIRA TARRANT, *WHEN SEX BECAME GENDER* 23 (2006).

<sup>24</sup> See ELEANOR FLEXNER, *CENTURY OF STRUGGLE* 77 (1959) (“In regarding the Seneca Falls convention as the birth of the movement for woman’s rights, we are on solid ground only if we remember that birth is a stage in the whole process of growth.”).

<sup>25</sup> See, e.g., Martha Minow, *Introduction: Finding Our Paradoxes, Affirming Our Beyond*, 24 HARV. C.R.-C.L. L. REV. 1, 2–3 (1989) (“The problem writers identified centered on the exclusion of women from the rights and prerogatives granted to at least some men. The goals in this first stage included securing rights to vote and to hold the same jobs as men.”). See generally NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK* (1982); AILEEN S. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT, 1890-1920* (1971) (discussing the history of the women’s suffrage movement during the late nineteenth and early twentieth centuries).

nism also laid the foundation for reproductive rights.<sup>26</sup> Notwithstanding these milestones, women were systematically excluded from power in the workforce during this time, an exclusion that was doubly harmful for working class women and women of color.<sup>27</sup> Although interest in organized feminism waned after the passage of the 19th Amendment, feminists continued to push for social change in the interwar period, proposing the Equal Rights Amendment and joining labor movements.<sup>28</sup> Even during this early period of American feminism, however, there was a cultural divide between (generally more privileged) “equality feminists,” who prioritized seeking formal legal equality with men through developments like the ERA, and the so-called “social justice feminists,” who were more focused on the pragmatic needs of working-class women and women of color. These differences persisted throughout the 1940s and 1950s.<sup>29</sup>

Feminism’s second wave—the modern women’s rights movement—gained momentum in the 1960s, resulting in the passage and enforcement by courts of Title VII,<sup>30</sup> the formation of the National Organization for Women (NOW) and other smaller women’s rights groups, and the 1968 bra-burning at the Miss America pageant.<sup>31</sup> It is during this second wave that the amended Rule 23 came into being and matured. Second-wave feminists radically altered the legal and cultural landscape for American women, successfully advocating for battered women’s shelters, reproductive rights, equal access to jobs that explicitly or functionally excluded women, sexual harassment pol-

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<sup>26</sup> See Margaret Sanger, BIOGRAPHY (Apr. 27, 2017), <https://www.biography.com/people/margaret-sanger-9471186> (describing Sanger’s opening of the first birth control clinic in the United States and subsequent reproductive rights advocacy work). See generally PETER BAGGE, WOMAN REBEL: THE MARGARET SANGER STORY (2013) (providing overview of Sanger’s life and national image).

<sup>27</sup> See ANGELA Y. DAVIS, WOMEN, RACE & CLASS 159–60 (1983) (describing class and racial divides of first wave feminist and suffrage movements); PENINA MIGDA GLAZER & MIRIAM SLATER, UNEQUAL COLLEAGUES: THE ENTRANCE OF WOMEN INTO THE PROFESSIONS, 1890-1940 (1987).

<sup>28</sup> COBBLE ET AL., *supra* note 7, at 15–23 (discussing the ways in which various women reformers impacted the labor movement before and during the New Deal era).

<sup>29</sup> *Id.* at 37–43 (explaining how the feminist victories of the 1940s and 1950s paved the way for wage discrimination reform).

<sup>30</sup> Ironically, the insertion of “sex” into Title VII is often said to have been either a joke or a poison pill inserted to prevent passage of the bill. See *infra* note 60 and accompanying text.

<sup>31</sup> In fact, the police barred the women from actually burning bras. See Nell Greenfieldboyce, *Pageant Protest Sparked Bra-Burning Myth*, NAT’L PUB. RADIO (Sept. 5, 2008), <http://www.npr.org/templates/story/story.php?storyId=94240375>. Following the success of *The Feminine Mystique*, Friedan co-founded the National Organization of Women (NOW). Another influential feminist, Gloria Steinem, a journalist whose writings included *After Black Power*, *Women’s Liberation*, co-founded *Ms.* magazine in 1972.

icies (indeed, coining the term “sexual harassment”<sup>32</sup>), women’s studies departments in colleges and universities, and equal funding for education and extra-curricular enrichment, among other things.<sup>33</sup>

As explained below, some—though by no means all—of these victories came in the form of Title VII class actions brought by the Equal Opportunity Employment Commission (EEOC),<sup>34</sup> by labor unions, and by individuals.<sup>35</sup> During this time, feminists also developed (or redeveloped<sup>36</sup>) theories of gender as a social construct, of systemic gender discrimination, and—among the rising number of feminist lawyers—of feminist jurisprudence.<sup>37</sup> Feminist theorists challenged not only the structure of the law, but also its language and methodologies, as reflecting and perpetuating patriarchy.<sup>38</sup> In order to challenge the seeming objectivity of rational analysis, second-wave feminists championed narrative scholarship.<sup>39</sup> Echoing the long-standing divide in the first wave between the social justice feminists and the equality feminists, second-wave feminists also vehemently

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<sup>32</sup> See GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* 84–85 (2016) (describing how three Cornell professors coined the term, which was picked up by a reporter and first appeared in *THE NEW YORK TIMES* in August, 1975); see generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 1 (1979) (arguing that sexual harassment is a structural, rather than an individual, legal problem).

<sup>33</sup> See, e.g., MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST* 42–43 (2007) (describing accomplishments of second-wave feminists, including the enactment of Title IX and the creation of women’s studies departments in colleges and universities).

<sup>34</sup> Title VII was amended in 1972 to grant the agency enforcement power. Equal Employment Opportunity Act of 1972, Pub. L. No. 920261, § 706(f)(1), 86 Stat. 103, 105 (1972) (codified at 42 U.S.C. 2000e-5(a) (2012)). See also Thomas J. Hart & George P. Sape, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 836–46 (describing legislative history of the Act).

<sup>35</sup> See *infra* Part II.B.

<sup>36</sup> See, e.g., COBBLE ET AL., *supra* note 7, at 84 (noting that second-wave feminists were generally unaware that “[b]y the end of the nineteenth century feminists like Elizabeth Cady Stanton had elaborated a radical, sophisticated critique of male dominance and, occasionally, of gender itself”).

<sup>37</sup> See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 (1983) (“The feminist theory of knowledge is inextricable from the feminist critique of power because the male point of view forces itself upon the world as its way of apprehending it.”).

<sup>38</sup> See, e.g., Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 47–48 (1988) (criticizing feminism for universalizing gender while “ignoring differences of racial, class, religious, ethnic, national, and other situated experiences”).

<sup>39</sup> See Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIF. L. REV. 381, 405–10 (2012) (describing how narrative scholarship allows women to share their oftentimes traumatic experiences stemming from gender-based oppression through story-telling, without implying that their stories represent the experiences of all women).



criticized the failings of their own movements. They could not agree on whether feminists should push for equal access to a “men’s world,” or whether they should seek accommodation for women’s differences, particularly pregnancy.<sup>40</sup> Radical feminists such as Catharine MacKinnon went further, questioning the premise of the sameness/difference model of equality.<sup>41</sup> Finally, critical legal theorists deplored the movement’s failure to squarely confront race or class or, often, sexual orientation—particularly including the role that middle- and upper-class white feminists played in maintaining those oppressive hierarchies.<sup>42</sup>

By the end of the 1980s, women’s studies centers were regular features of university landscapes and women were entering professional schools and other parts of the workforce in momentous numbers. Yet these gains, perhaps taken for granted,<sup>43</sup> seem in key ways to have weakened, rather than reinforced, feminism’s stature as a cultural and political influence. The second-wave feminist movement was one of the nation’s largest social movements.<sup>44</sup> Despite, or perhaps because of, its size, feminism lost its focus under the resurgence of conservative politics under President Ronald Reagan.

In this sense, feminism’s so-called third wave—which emerged in response to the outrage against Justice Clarence Thomas’s 1991

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<sup>40</sup> See Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 SUP. CT. REV. 201, 206 (1988) (noting that “formal equality is not capable of discerning discrimination against pregnant people”).

<sup>41</sup> Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290–91 (1991) (“Then equality law tells women that they are entitled to equal treatment mainly to the degree they are the same as men. The inadequacy of the sameness/difference model, and its consequences for equality under law, are strikingly revealed by the law’s treatment of women of color.”).

<sup>42</sup> See, e.g., COBBLE ET AL., *supra* note 7, at 92–100; BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 145 (1981) (noting that “many upper and middle class white feminists who suffer least from sexist oppression were attempting to focus all attention on themselves”); Minow, *supra* note 38. Recently, scholars have sought to revise this history to reflect a greater racial integration in the women’s movement. See, e.g., FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES 2 (Stephanie Gilmore ed., 2008) (“[W]e know from various scholarly rejoinders and our own lived experiences that the movement was diverse, multifaceted, and spoke to and for many women.”). Other scholars have argued that there was a greater role for feminists in the passage of Title VII than the traditional story acknowledges. See Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55 (2016); Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. REV. 713, 722 (2015) (“No mere outsiders or gadflies, these women were enormously influential in Title VII’s early development.”).

<sup>43</sup> See JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 17 (2000) (“For our generation, feminism is like fluoride. We scarcely notice that we have it—it’s simply in the water.”).

<sup>44</sup> COBBLE ET AL., *supra* note 7, at 71.

confirmation hearings<sup>45</sup>—was in part a reaction to, and an oversimplification of, the second wave. “Younger feminists argued that the second wave was almost exclusively white (ignoring second-wave feminists of color), overly puritanical . . . (ignoring diverse second-wave perspectives on sexuality), and prescriptive . . . (ignoring the multiplicity of second-wave feminisms, plural).”<sup>46</sup> The third wave was defined by individualism and intersectionality, and—perhaps because discrimination had become less explicit than it was during the age of single-sex job descriptions—its goals were more difficult to tie to a unifying political theme or action.<sup>47</sup> In fact, it is unclear whether this third wave can really be described as a feminist movement at all; many women of this generation refused to self-identify as feminists. The glass ceiling and the pay gap persisted, but the concept of feminism became tainted, or at a minimum antiquated.<sup>48</sup> The effects of this individualism permeated the legal academy, where feminist theory tapered off, although several influential scholars continued their work and new voices drew on social science literature to critique the systemic, implicit barriers to freedom from discrimination.<sup>49</sup>

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<sup>45</sup> In a 1992 edition of *Ms.* devoted to women’s reactions to the Thomas hearings, Rebecca Walker, twenty-two-year-old daughter of Alice Walker, wrote an analysis that ended with the statement: “I am not a postfeminist feminist. I am the Third Wave.” Rebecca Walker, *Becoming the Third Wave*, *Ms.*, Jan.–Feb. 1992, at 39, <http://www.msmagazine.com/spring2002/BecomingThirdWaveRebeccaWalker.pdf>. While that statement took hold and defined the term “third-wave feminism,” it was only one of many outraged reactions by feminists to Clarence Thomas’s appointment. For example, over 1600 women signed a full-page statement in the *New York Times*, “African American Women in Defense of Ourselves.” COBBLE ET AL., *supra* note 7, at 150. Also published in this period were Susan Faludi’s *Backlash* in 1991 and Naomi Wolf’s *The Beauty Myth* in 1991, seminal texts in the third wave of feminism.

<sup>46</sup> COBBLE ET AL., *supra* note 7, at 170.

<sup>47</sup> See, e.g., Gwendolyn Beetham, *The Academic Feminist: Using the Past to Reimagine the Present with Imani Perry*, FEMINISTING, <http://feministing.com/2012/01/24/the-academic-feminist-using-the-past-to-reimagine-the-present-with-imani-perry-2/> (last visited Sept. 7, 2017) (noting that “somewhere along the way, certain branches of third (and fourth) wave feminism got caught up in the neoliberal fixation on personal choice and the individual experience, embracing sexiness without challenging the larger power relations that socialize the very ideas about what sexy is”).

<sup>48</sup> See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 2* (Three Rivers Press ed., 2006) (describing “[t]he prevailing wisdom of the past decade” as holding that “[t]he women’s movement, as we are told time and again, has proved women’s own worst enemy”); *The Failure of Feminism*, NEWSWEEK (Nov. 18, 1990, 7:00 PM), <http://www.newsweek.com/failure-feminism-205870> (“[W]omen don’t belong in 12-hour-a-day executive office positions, and I can’t figure out today what ever made us think we would want to be there in the first place.”).

<sup>49</sup> See, e.g., Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1227–37 (1995).

Activists have identified the current age of feminism—allegedly the fourth wave—with social media and podcasts, with intersectionality and internationalism, with fluidity of gender and sexual orientation, with marriage equality, and with ongoing battles against sexual assault, particularly—though not only—on college campuses.<sup>50</sup> In those areas, activists and scholars have accomplished sweeping change, often with vital assistance from courts.<sup>51</sup> Despite (or perhaps because of) this wide embrace, it was unclear until recently whether these impulses would coalesce into a wide-ranging feminist movement with social and legal influence such as Black Lives Matter.<sup>52</sup> The 2017 Women’s March on Washington, which adopted a consciously intersectional and inclusive agenda,<sup>53</sup> may signal the onset of a newly invigorated, national movement; time will tell.

Thus far, feminism’s fourth wave has had a quiet presence in the legal academy. Current gender theory continues the third-wave focus on individualization and intersectionality rather than on a (presumably confining and stereotypical) group identity.<sup>54</sup> There are, however, notable exceptions.<sup>55</sup> And both in and out of the academy, despite a

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<sup>50</sup> See, e.g., ROXANE GAY, *BAD FEMINIST*, at xii–xiv (2014) (discussing the fourth wave); J. JACK HALBERSTAM, *GAGA FEMINISM: SEX, GENDER, AND THE END OF NORMAL* 9–10 (2012) (discussing fluidity of gender); *THE GUILTY FEMINIST*, <http://guiltyfeminist.libsyn.com/> (“discuss[ing] topics ‘all 21st century feminists agree on’”) (last visited Sept. 7, 2017); 2 *DOPE QUEENS*, <http://www.wnyc.org/shows/dopequeens> (“stories about sex, romance, race, hair journeys, living in New York, and Billy Joel”) (last visited Nov. 20, 2016).

<sup>51</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (holding that the Fourteenth Amendment mandates recognition of same-sex marriages); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) (holding that Title VII’s prohibition on sex discrimination encompasses discrimination based on sexual orientation).

<sup>52</sup> Activists have characterized Black Lives Matter as a feminist movement. See Alicia Garza, *A Herstory of the #BlackLivesMatter Movement*, *THE FEMINIST WIRE* (Oct. 7, 2014), <http://www.thefeministwire.com/2014/10/blacklivesmatter-2/> (“Black Lives Matter affirms the lives of Black queer and trans folks, disabled folks, Black-undocumented folks, folks with records, women and all Black lives along the gender spectrum.”).

<sup>53</sup> *Mission and Vision: Our Mission*, *WOMEN’S MARCH ON WASHINGTON*, <https://www.womensmarch.com/mission/> (last visited Jan. 23, 2017) [hereinafter *WOMEN’S MARCH*].

<sup>54</sup> See, e.g., Zachary A. Kramer, *The New Sex Discrimination*, 63 *DUKE L.J.* 891, 895–96 (2014) (critiquing as outdated “a sex discrimination regime that still views the group as the focal point of discrimination”); see also BERKELEY J. GENDER L. & JUST., <https://genderlawjustice.berkeley.edu/> (last visited Sept. 4, 2017) (explaining mandate “to publish feminist legal scholarship . . . [on] the intersection of gender with one or more axis of subordination”).

<sup>55</sup> See, e.g., TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 2–5 (2017) (arguing that organizations and groups, rather than mere individuals, must be responsible for dismantling the discriminatory systems they have constructed); Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, *HARV. J. L. & GENDER* (2016) (arguing that

renewed focus on the intersection of race, class, and feminism, many of the most prominent feminist voices—such as those seeking remedies for campus sexual assaults through Title IX, or access to the highest echelons of Silicon Valley—tend to focus on issues that are most relevant among highly educated, wealthier women.<sup>56</sup>

The questions debated among women today—whether women can obtain equality if they “lean in,”<sup>57</sup> whether systemic change is the only effective way to alter women’s experiences in the workplace, and whether feminism can be separated from discrimination based on race, class, and sexual orientation—have now been debated in feminist circles for decades. Yet the events of 2016, culminating in Hillary Clinton’s loss in the presidential election despite rampant and credible sexual assault allegations against Donald Trump,<sup>58</sup> bring into sharp relief the fact that neither law, nor society, has yet answered these questions. As the next Section shows, in addition to marches and protests,<sup>59</sup> aggregate litigation has a role to play in remedying ongoing gender discrimination.

### B. *Parallels in Class Action Doctrine*

Title VII has transformed the lives of women at work, and—not infrequently—it has done so through class litigation. This Section shows that the waves of feminism (themselves buffeted by outside social forces) are reflected in the expansion, and the subsequent contraction, in the effective use of class actions in Title VII sex discrimination cases.

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the solution to the problem of racist systems may lie in the implementation of gender quotas), <http://harvardjlg.com/2016/11/reconsidering-the-remedy-of-gender-quotas/> (last visited Sept. 7, 2017); Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 572–77 (2016) (discussing childcare and family concerns as group identity issues).

<sup>56</sup> See Susana Loza, *Hashtag Feminism, #SolidarityIsForWhiteWomen, and the Other #FemFuture*, ADA, [http://adanewmedia.org/2014/07/issue5-loza/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=issue5-loza](http://adanewmedia.org/2014/07/issue5-loza/?utm_source=rss&utm_medium=rss&utm_campaign=issue5-loza) (last visited Sept. 4, 2017) (discussing a movement that rejects “American feminism’s brand of solidarity, one which ‘centers on the safety and comfort of white women’ at the expense of women of color”).

<sup>57</sup> See SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* (2013).

<sup>58</sup> Jia Tolentino, *Trump and the Truth: The Sexual-Assault Allegations*, THE NEW YORKER (Oct. 20, 2016), <http://www.newyorker.com/news/news-desk/trump-and-the-truth-the-sexual-assault-allegations> (discussing numerous sexual assault allegations made against Donald Trump and the Access Hollywood tape where he bragged about sexually assaulting women by noting that he would “just start kissing” nonconsenting women because “[w]hen you’re a star, they let you do it”).

<sup>59</sup> See WOMEN’S MARCH, *supra* note 53 (“We will not rest until women have parity and equity at all levels of leadership in society. We work peacefully while recognizing there is no true peace without justice and equity for all.”).

Neither the amended Rule 23 nor Title VII existed during the first wave of feminism. Once Rule 23 was adopted, however, the second wave of feminism was marked by a significant number of Title VII class actions, as courts grew increasingly comfortable with the new procedural vehicle and newly willing to confront the widespread, generally explicit, discrimination against working women that persisted into the 1980s. Indeed, there are more second-wave class action cases adjudicating women's rights under Title VII than in the third or fourth wave combined.<sup>60</sup>

The cases during this period are held together by some notable common themes. First—in line with the goals of second-wave feminism—"second-wave" Title VII class actions for gender discrimination tended to challenge explicit bias against women (or, on occasion, men<sup>61</sup>) as embodied in facially discriminatory employment policies or practices.<sup>62</sup> In other words, rarely was a case brought that challenged structural sexism or implicit bias. Instead, these early Title VII class actions challenged policies such as gender-based job classifications and requirements,<sup>63</sup> gender-differentiated pension fund contributions,<sup>64</sup> and sex-discriminatory promotion practices.<sup>65</sup>

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<sup>60</sup> The authors conducted a Westlaw search in the federal appellate court database for reported "class action!" decisions involving "women" or "gender" or "female." The results were then categorized by feminist-wave dates. The first wave of feminism included zero cases; the second wave included 126 cases; the third wave included nine cases; and the fourth wave included twenty-two cases. This research is on file with the authors and the *N.Y.U. Law Review*.

<sup>61</sup> See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (class of men successfully challenging airline's policy of hiring only women as flight attendants).

<sup>62</sup> See, e.g., *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 190 (1991) (challenging policy barring all women, except those who could medically document infertility, from certain higher-paying jobs); see also Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659, 709 (2003) (discussing remedies that sought to "open[ ] up" opportunities by removing barriers and increasing the number of out-group individuals in organizations by broadening recruitment efforts and numerical hiring requirements).

<sup>63</sup> E.g., *Dothard v. Rawlinson*, 433 U.S. 321, 323–24 (1977) (challenging height and weight requirements for corrections officers in state penitentiary); *Am. Nurses' Assoc. v. Illinois*, 783 F.2d 716, 718 (7th Cir. 1986) (challenging male and female job classifications in nursing that resulted in higher wages for men); *Inda v. United Airlines, Inc.*, 565 F.2d 554, 556 (9th Cir. 1977) (case challenging no-marriage rule for only female flight attendants); *Diaz*, 442 F.2d 385; *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 714 (7th Cir. 1969) (challenging job applications based on weight restrictions and how much women could lift); *McCrimmon v. Daley*, 418 F.2d 366, 367 (7th Cir. 1969) (challenging law that would not permit women to tend bar).

<sup>64</sup> *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 704 (1978) (challenging policy that required women to make larger pension contributions because of longer life span).

<sup>65</sup> *Hardin v. Stynchcomb*, 691 F.2d 1364, 1365–66 (11th Cir. 1982) (challenging policy that would not promote female officers even when their test scores and other application qualifications exceeded the requirements); *In re Sw. Bell Tel. Co. Maternity Ben. Litig.*,

Second, notwithstanding the offensive jocularity that surrounded the inclusion of “sex” in Title VII,<sup>66</sup> and the initial reluctance by the EEOC to prioritize sex discrimination,<sup>67</sup> courts during this period were by and large receptive to the efforts of women to obtain redress through the use of Rule 23. This positive reception was due, in part, to the auspicious conflation of courts’ acceptance of the class action device and a robust, activist feminist movement.

As David Marcus has argued, in the period leading up to 1980 courts were receptive to the class action in part because they tended to use the device pragmatically, without developing or referencing a larger theory of Rule 23.<sup>68</sup> In the context of Title VII, this pragmatism often opened the door to Title VII sex discrimination class actions. Courts during the second wave of feminism tended to grant class certification with a casual—almost non-analytical—approach to the requirements of Rule 23.<sup>69</sup> District courts generally reached the merits of the cases either through a motion to dismiss, trial, preliminary injunction, or summary judgment.<sup>70</sup> Appellate courts reviewed those merits and, like the district courts, only rarely had occasion to reflect on class certification.<sup>71</sup>

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602 F.2d 845, 846–47 (8th Cir. 1979) (challenging lack of guaranteed reinstatement into job following maternity leave).

<sup>66</sup> See Schultz, *supra* note 11, at 1014–21 (discussing and calling into question the story that some Congressmen attempted to defeat the adoption of Title VII with the last-minute inclusion of sex discrimination).

<sup>67</sup> See *id.* at 1025–27 (“In the absence of concerted pressure from women’s groups, early EEOC officials resisted the idea that sex discrimination was a serious social problem akin to race discrimination or that sex-segregated employment reflected labor market discrimination like racial segregation.”).

<sup>68</sup> Marcus, *supra* note 8, at 626.

<sup>69</sup> See Green, *supra* note 55, at 678–79 (noting that during the first ten years of Title VII enforcement actions, “courts readily certified ‘across-the-board’ class actions in employment discrimination cases, without much attention to the requirements of Rule 23”).

<sup>70</sup> See, e.g., *Bouman v. Block*, 940 F.2d 1211, 1217 (9th Cir. 1991) (affirming trial court’s determination that county discriminated against female officers in its promotion practices); *Am. Nurses Assoc. v. Illinois*, 783 F.2d 716, 718–19, 730 (7th Cir. 1986) (reversing district court’s grant of defendant’s motion to dismiss on merits of nurses’ Title VII job classification claim); *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507, 1508–09 (11th Cir. 1987) (enjoining defendant from violating Title VII by refusing to hire women or by advertising positions for a specific gender); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 651 (5th Cir. 1983) (reversing district court’s bench trial judgment against class claims alleging gender discrimination in hiring and promotion practices); *Acha v. Beame*, 531 F.2d 648, 649 (2d Cir. 1976) (reversing and remanding district court’s decision to deny injunctive relief because if female police officers could show that, except for sex, they would have been hired early enough to accumulate sufficient seniority to withstand current layoffs, there was a violation).

<sup>71</sup> As a matter of procedure, appellate courts were often unable to take interlocutory review of certification decisions following the Supreme Court’s 1978 decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). In that case, the Court struck down the so-called

Reinforcing this procedural receptivity was a vigorous, nationwide feminist movement—described above—that provided political and theoretical support for women's workplace equality. Rule 23 may have been undertheorized at this time,<sup>72</sup> but women's equality was not. The Department of Justice, EEOC, Congress, and the courts were all responsive to an active, organized movement advocating for women's equality.<sup>73</sup> As a result, many second-wave Title VII class action plaintiffs prevailed.<sup>74</sup> District courts taking a narrow view of discrimination in these cases were reversed with surprising frequency.<sup>75</sup> Perhaps the emblematic second-wave Title VII class action

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death-knell doctrine of interlocutory appeal, meaning that until the adoption of Fed. R. Civ. P. 23(f) in 1997, most certification decisions were effectively unreviewable. *Id.* at 465. Moreover, the rare cases where certification was denied did not appear to be all that controversial. For instance, in one case, the district and appellate courts denied certification where the plaintiff's claims were clearly individual and plaintiff did not show other potential class members necessary to satisfy numerosity. *See Mazus v. Dep't of Transp.*, 629 F.2d 870, 874–76 (3d Cir. 1980). However, some class certification decisions were not so cut and dry. For example, in *Merrill v. Southern Methodist University*, 806 F.2d 600 (5th Cir. 1986), the court denied certification of a plaintiffs' class of women who were employed or would be employed at SMU and suffer the gender discrimination in tenure decisions. *Id.* at 608. The court affirmed the denial of certification, in part, because of lack of commonality. There were no alleged "disparate impact" rules or policies. *Id.* The court worried that because each tenure denial would "turn[ ] on unique facts: the quality of *this* professor's teaching, the substance of *her* publications, the range of *her* service," the proposed class action would "have quickly disintegrated into a plethora of individual claims." *Id.*

<sup>72</sup> *See* Marcus, *supra* note 8, at 626 (describing courts' use of Rule 23 as "[a]t times doctrinally unprincipled and often undertheorized").

<sup>73</sup> *See* Schultz, *supra* note 11, at 1039–46 (describing successes by NOW and Ruth Bader Ginsburg's ACLU Women's Rights Project in pushing for strong sex discrimination law under Title VII).

<sup>74</sup> *See, e.g.,* *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (finding in favor of a class of women employees challenging city pension plan that required women to make larger contributions than men based on actuarial finding that women lived longer); *Bouman*, 940 F.2d 1211 (finding in favor of class of women employees alleging sex discrimination claims in L.A. County Sheriff Department's promotion practices); *Capaci*, 711 F.2d 647 (finding in favor of class of women employees alleging sex discrimination in employer manager trainee program); *Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991) (finding in favor of class of women employees challenging company's policy of barring women from jobs involving actual or potential lead exposure).

<sup>75</sup> For example, in *Marsh v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981), the district court did not find prima facie evidence of gender discrimination where 100% of the women hired during a four-year period were placed in the lowest positions within the company while only 52.9% of the men hired were placed in those positions. *Id.* at 329. This distribution occurred even when the female and male applicants were often equally well-qualified for different positions. *Id.* at 330. The district court determined that a small sample size of only forty-four employees prevented it from finding prima facie sex discrimination. *Id.* at 329. The appellate court reversed, though it found that a small company could avoid liability for unlawful hiring practices simply by virtue of being a smaller enterprise. *Id.*; *see also Int'l Union*, 499 U.S. 187 (holding that a company's fetal-protection policy of barring all women, except those who were not fertile, from jobs where employees were exposed to

was *UAW v. Johnson Controls*, in which the Supreme Court held that the defendant company's policy of excluding women, but not men, of childbearing age from jobs that might expose them to lead violated Title VII. The Court found the bias in the policy to be "obvious," and it rejected the company's defense that the policy was necessary for fetal protection.<sup>76</sup> Notably, in upholding the women's claims, the Court never even analyzed Rule 23's requirements.<sup>77</sup>

During the heyday of second-wave feminism, Title VII plaintiffs made substantial gains for women in the workplace, including through the use of the new Rule 23. But just as the third wave of feminism—starting in the early 1990s—was less unified and weaker than its predecessor, Title VII class actions also entered a more complex phase during this period. Notably, the early case law contributed to this problem. First, one result of courts' lack of Rule 23 analysis in early cases was a smaller corpus of cases broadly supporting (and explaining) certification, including commonality and the scope of Rule 23(b)(2)'s reach.<sup>78</sup> Though it became a routine element of federal litigation, Rule 23 remained something of a cipher. Similarly, the blatant nature of the discriminatory policies in the 1970s and 1980s made the cases of that era only somewhat informative of the less obvious, more subjective forms of discrimination that permeated Title VII class actions starting in the 1990s for plaintiffs in race as well as sex discrimination cases.<sup>79</sup> In addition, the political landscape shifted during the 1990s, as both feminism and class actions suffered backlashes. Finally, the law itself changed: The 1991 amendments to Title VII allowed plaintiffs to recover both punitive and compensatory damages<sup>80</sup> and

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lead was discriminatory under Title VII and not a bona fide occupational qualification, after the district court held otherwise). It is not as if all plaintiffs were successful, however. For example, in *Valentino v. U.S. Postal Serv.*, 674 F.2d 56, 73 (D.C. Cir. 1982), then-Judge Ginsburg held that the plaintiff class failed to present prima facie evidence of discrimination because of its "unrefined statistics coupled with [its insufficient] non-statistical evidence."

<sup>76</sup> 499 U.S. at 197; *id.* at 207 ("Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization.").

<sup>77</sup> *Id.* at 211 (announcing the holding as an interpretation of the PDA, without mentioning Rule 23).

<sup>78</sup> See Marcus, *supra* note 17, at 781 (noting that "[o]ld-era judges certified classes casually, even perfunctorily, and thus did not build a reservoir of doctrinal wisdom to guide Rule 23's application in [public interest class action] cases").

<sup>79</sup> Compare notes 57–59 and accompanying text (describing lawsuits challenging overt discrimination against women in the workplace) with Green, *supra* note 56, at 680–81 (discussing how during this time discrimination became viewed as more "individualiz[ed]," leading to a lower number of class actions).

<sup>80</sup> 42 U.S.C. § 1981a(b)(1) and (b)(3) (2012) (providing for punitive and compensatory damages, respectively).



Rule 23 was amended in 1998 to allow for a more amenable interlocutory appeal of certification decisions.<sup>81</sup> Nevertheless, in practice many courts in the 1990s adhered to their earlier, pragmatic approach to class certification.<sup>82</sup>

As a result of these contradictory trends, class actions during the third wave of feminism present a mixed picture. Courts in many third-wave Title VII sex discrimination cases certified classes where the alleged discrimination was based on discretionary promotional or other employment practices across a company, frequently finding expert statistical evidence sufficient to establish Rule 23(a)(2)'s commonality requirement.<sup>83</sup> Before the 1991 amendments to Title VII, courts also regularly allowed plaintiffs to seek incidental back and front pay by treating those remedies as equitable and thus permitted under a Rule 23(b)(2) certification.<sup>84</sup> With the addition of potential compensatory and punitive damages to Title VII, some courts sought to balance class-wide and individualized harms by certifying hybrid classes, with Rule 23(b)(2) governing the claims for declaratory and injunctive relief and Rule 23(b)(3) covering compensatory claims.<sup>85</sup> Other courts began to see complications in suits seeking both injunctive relief and money damages. These courts saw the potential for both compensatory and punitive damages as prohibitive. Most notably, in *Allison v. Citgo Petroleum Corp.*, the Fifth Circuit held that class action employment discrimination suits seeking injunctive relief and money damages could only be certified when the damages were "incidental," and it rejected any kind of hybrid approach to cer-

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<sup>81</sup> FED. R. CIV. P. 23(f) (allowing for discretionary interlocutory appeal of class certification decisions). Notably, the Judicial Conference asked the Advisory Committee to look at whether Rule 23 should be amended to allow for interlocutory appeal in 1991. See Scott Dodson, *A Negative Retrospective of Rule 23*, 92 N.Y.U. L. REV. 917 (2017).

<sup>82</sup> See *infra* note 62 and accompanying text.

<sup>83</sup> See, e.g., *Hnot v. Willis Grp. Holdings Ltd.*, 241 F.R.D. 204, 210 (S.D.N.Y. 2007) (relying on statistical evidence to find commonality in disparate impact case); *Anderson v. Boeing Co.*, 222 F.R.D. 521, 537 (N.D. Okla. 2004) (same); *Marquis v. Tecumseh Prods. Co.*, 206 F.R.D. 132, 158 (E.D. Mich. 2002) (finding commonality based on plaintiffs' allegations that defendant's anti-harassment policies were inadequate or non-existent, though the court ultimately decided not to certify based on the requirements); *Beckmann v. CBS, Inc.*, 192 F.R.D. 608, 613 (D. Minn. 2000) (agreeing with other courts that "allegations of similar discriminatory employment practices, such as the use of entirely subjective personnel processes that operate to discriminate, satisfy the commonality and typicality requirements of 23(a)").

<sup>84</sup> See Green, *supra* note 55, at 698 (noting that courts often certified classes seeking both injunctive relief and back pay as Rule 23(b)(2) class actions "despite the individual issues thereby created"). The courts would generally bifurcate the proceedings to allow the liability phase to be adjudicated before addressing the individualized remedies members of the class were seeking. See *id.* at 698–99.

<sup>85</sup> See, e.g., *id.* at 703 (describing the process by which courts establish a hybrid class action in order to address due process concerns).

tification because of concerns about predominance.<sup>86</sup> Still other courts—foreshadowing the Supreme Court’s tone in *Wal-Mart v. Dukes*—rejected commonality in situations where discretionary decisions were at play.<sup>87</sup> These courts were skeptical of statistical experts yet they also found anecdotal evidence insufficient.<sup>88</sup> Often this hostility to commonality appeared when the class included women with significantly different job descriptions.<sup>89</sup> On a deeper level though, some of the cases rejecting commonality among classes of women evince disbelief that gender discrimination—rather than individual choices, or a multitude of other factors—were causing the statistical differences.<sup>90</sup> At the same time, the divided, inwardly focused genera-

<sup>86</sup> 151 F.3d 402, 415, 418–20 (5th Cir. 1998).

<sup>87</sup> The seeds of this skepticism were, in part, initially sown in a case addressing claims of racial discrimination where the Supreme Court rejected the certification of an across-the-board class of Mexican American employees and applicants alleging employment discrimination. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147 (1982). More specifically, the Court stated, “If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.” *Id.* at 159. *See also* Green, *supra* note 55, at 691 n.138 (cataloguing a set of racial and gender employment discrimination cases where courts rejected commonality on the basis of discretionary decision making).

<sup>88</sup> *See, e.g.*, *Love v. Johanns*, 439 F.3d 723, 731 (D.C. Cir. 2006) (“We have never held that subjective decision-making processes require a district court to find commonality for purposes of class certification.”); *Grosz v. Boeing*, No. 04-55428, 2005 WL 1515070, at \*1 (9th Cir., June 28, 2005) (holding that it was not an abuse of discretion to not certify a class where employer used discretionary hiring practices and class contained diversity of job descriptions); *Puffer v. Allstate Ins. Co.*, 255 F.R.D. 450, 465–68 (N.D. Ill. 2009) (finding no commonality based on expert’s statistics, reports, and affidavits of class members); *Birdsong v. City of Memphis*, 224 F.R.D. 634, 640 (W.D. Tenn. 2003) (“[G]iven the different managers, supervisory chains, decisions, and each Plaintiff’s varying history within the [police] Department, this determination would require investigation into hundreds of current or former employees”). *But see* *Butler v. Home Depot, Inc.*, No. C-94-4335 SI, 1996 WL 421436 (N.D. Cal. Jan. 25, 1996) (certifying a class of female employees and applicants alleging gender-biased hiring, training, transfer, promotion, and compensation on the basis of statistical and anecdotal evidence).

<sup>89</sup> *See, e.g.*, *Reeb v. Ohio Dep’t of Rehab. & Corr.*, No. 02-3105, 2003 WL 22734623, at \*34 (6th Cir. Nov. 18, 2003) (rejecting district court’s class certification for lack of “rigorous analysis,” and noting that class included laundry workers, graphic artists, biologists, and corrections officers, among others).

<sup>90</sup> *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355 (2011) (“To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.”); *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1307 (N.D. Ill. 1986) (attributing statistical evidence of gender disparities within sales-commission positions to disinterest among women because they “feared or disliked the perceived ‘dog-eat-dog’ competition . . . were uncomfortable or unfamiliar with the products sold on commission . . . [or] fear[ed] being unable to compete, being unsuccessful [or] losing their jobs”). *See generally* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI.

tion of third-wave feminists no longer presented a unified political or theoretical stance that could combat this skepticism.

The Supreme Court's decision in *Wal-Mart*—a case that sets the standard for Title VII class actions in feminism's fourth wave—combined and enshrined these various strains of skepticism. Its decision was premised on the unsupported assumption that employers generally do not discriminate against women, whether intentionally, negligently, or as a result of systemic biases.<sup>91</sup> Because of this assumed norm of non-discrimination, the women in the class could have no common claims; just being women was of no moment.<sup>92</sup> In one strike, the Court simultaneously contracted both its Rule 23 and Title VII jurisprudence. Indeed, as the third wave of feminism came to a close, the auspicious conflation of a flexible approach to Rule 23 and an active feminist movement had given way to class action skepticism and fractured feminism.

Entering the fourth wave, feminism and Title VII class actions continue to present a complicated story. There is the bleak side: Courts addressing Title VII class actions post-*Wal-Mart* have undoubtedly been affected by the *Wal-Mart* majority's cramped definition of commonality.<sup>93</sup> Unsurprisingly, this is most apparent in cases

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L. REV. 1073, 1079 (1992) (arguing that perceptions of women as "marginal workers, whose early socialization (or even biological predisposition) to stereotypically 'feminine' roles precludes a commitment to nontraditional work" mean that courts believe that "women workers 'choose' lower-paying, female-dominated jobs to preserve their feminine identities and their familial roles.").

<sup>91</sup> *Wal-Mart*, 564 U.S. at 355 (stating without citation that "most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produces no actionable disparity at all").

<sup>92</sup> See Schultz, *supra* note 11, at 1066 (noting that *Wal-Mart* "reaffirmed a line of caselaw that denies the reality of workplace sex discrimination and casts doubt on the need for Title VII").

<sup>93</sup> See *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 116 (4th Cir. 2013) (affirming district court's denial of class certification because the "complaint fails to allege that the 'subjectivity and stereotyping' regarding compensation paid to female store managers were exercised in a common way with some common direction," but acknowledging that plaintiffs' amended complaint of higher-management level discrimination might survive *Wal-Mart* scrutiny); *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013) (rejecting plaintiffs' class-wide allegations because they had not alleged a "common mode of exercising discretion that pervade[d] the entire company," quoting *Wal-Mart*, 564 U.S. at 256, but had instead only shown a "highly discretionary policy for granting promotions"); *Davis v. Cintas Corp.*, 717 F.3d 476, 488 (6th Cir. 2012) (affirming district court decision to deny class certification because "[a]s in *Dukes*, the gravamen of Davis's claim is not that the Meticulous Hiring System's objective criteria led to an anti-female bias, but that subjective decisions made by some of Cintas's managers favored males because of Cintas's male-dominated corporate culture"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9th Cir. 2011) (reversing and remanding the district court's decision to certify a class because it used admissible evidence as the sole evidence of commonality when it was not clear that nationwide discrimination existed).

like *Wal-Mart* where there is no written or stated corporate policy of discrimination, but instead an allegation that lower-level managers are exercising their discretion in variant discriminatory ways. As one court explained quite plainly, “[W]here persons who are afforded discretion exercise that discretion differently, commonality is not established.”<sup>94</sup> Yet, there is also hope: Lawyers and courts are distinguishing *Wal-Mart* and finding ways to construct Title VII class actions that can withstand heightened scrutiny. *Ellis v. Costco Wholesale Corp.*,<sup>95</sup> for example, involved a nationwide class of women alleging discrimination in promotion and hiring. The *Ellis* class consisted of just two closely-related management positions, and it alleged that Costco’s decisions were guided by specific practices that came from top-level management.<sup>96</sup> In this way, the case was different enough from *Wal-Mart* to survive certification; perhaps that is a sign that Title VII impact litigation can survive.

Yet, much like the current wave of feminism—where the movement is at once atomizing and attempting to coalesce—the limitations placed on Title VII class actions threaten to reduce the effectiveness of this kind of litigation for all women. That *Ellis* helped only management-level women and relied on executive-level policies means that women in lower-paying jobs—those who are often discriminated against on the basis of inherent bias wielded through discretionary acts—may not be able to use Title VII class actions to remedy the discrimination they experience. In other words, current Title VII class actions and feminism suffer the same critique: They appear to help predominantly the haves rather than the have-nots.

Outside of Rule 23, other legal developments such as the onset of arbitration clauses and class action waivers threaten the viability of Title VII class actions as well. For instance, in *Parisi v. Goldman Sachs & Co.*,<sup>97</sup> the Second Circuit found that where the plaintiff had signed a binding arbitration clause in her employment agreement, she had no right to bring a class action asserting a collective pattern-or-practice discrimination claim under Title VII.<sup>98</sup> Her only recourse was indi-

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<sup>94</sup> *In re Wells Fargo Residential Mortg. Lending Discrimination Litig.*, No. 08-MD-01930 MMC, 2011 WL 3903117, at \*4 (N.D. Cal. Sept. 6, 2011).

<sup>95</sup> 285 F.R.D. 492 (N.D. Cal. 2012). The case settled for \$8 million. See Kate Cox, *Costco Settles Gender-Discrimination Lawsuit for \$8 Million*, THE CONSUMERIST (Dec. 20, 2013), <https://consumerist.com/2013/12/20/costco-settles-gender-discrimination-lawsuit-for-8-million/>. But see *Bell v. Lockheed Martin Corp.*, No. 08-6292 (RBK/AMD), 2011 WL 6256978, at \*4–5 (D.N.J. Dec. 14, 2011) (relying on *Wal-Mart* in refusing to certify class of female employees alleging gender discrimination and retaliation).

<sup>96</sup> *Ellis*, 285 F.R.D. at 509.

<sup>97</sup> 710 F.3d 483 (2d Cir. 2013).

<sup>98</sup> *Id.* at 488.

vidual arbitration.<sup>99</sup> Consumer contracts that include class action waivers in their arbitration clauses have already been blessed by the Supreme Court in *AT&T Mobility, LLC v. Concepcion*.<sup>100</sup> To the extent employment contracts include similar provisions, it appears that those clauses are also likely to be enforced.<sup>101</sup> While there is some momentum behind regulating the inclusion of class action waivers in some contracts,<sup>102</sup> the future of that regulation is uncertain.<sup>103</sup>

In sum, the modern Title VII class action, like modern feminism, is of uncertain strength and influence as a tool for social change.<sup>104</sup> In contrast with the widespread feminist movement before 1990, the sense of commonality among women has weakened. The celebrated—although imperfect—feminist movement of the 1960s and 70s has fractured. That weakened commonality between women in the feminist movement has permeated Title VII class action doctrine. It remains to be seen whether both feminism and the class action will remain viable tools under a new administration and a changing Supreme Court.

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<sup>99</sup> *Id.*

<sup>100</sup> 563 U.S. 333, 352 (2011).

<sup>101</sup> See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1592, 1595 (2016) (predicting that “consumer and employment class actions will decline in the next decade” due to the Court’s blessing of the class action waiver and citing recent studies showing that employers are adopting the approach). Moreover, as this article goes to print, the Supreme Court will hear arguments on a trilogy of cases presenting a circuit split as to whether the National Labor Relations Act prohibits employment agreements that forbid collective action (in arbitration or in court). See *Epic Sys. Corp. v. Lewis*, No. 16-285 (U.S. consolidated Jan. 13, 2017).

<sup>102</sup> The Consumer Financial Protection Bureau proposed a rule banning class action waiver provisions from contracts between banks and consumers. See *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers Their Day in Court*, CONSUMER FIN. PROT. BUREAU (May 5, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>. Similarly, the NLRB ruled that class action waivers are void, which led to a circuit split on the issue. *DR Horton, Inc.*, 357 N.L.R.B. 184 (2012). Compare *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 (9th Cir. 2016) (agreeing with the NLRB that the class action waiver was unenforceable) with *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (reversing the NLRB’s decision to void class action waivers).

<sup>103</sup> See Perry Cooper, *Trump Presidency Creates Uncertainty for Arbitration Rules*, BLOOMBERG BNA NEWS (Nov. 10, 2016), <http://www.bna.com/trump-presidency-creates-n57982082665/> (arguing that Trump’s support for arbitration prior to his election suggests that recent increases in the regulation of arbitration agreements could be reversed during his presidency).

<sup>104</sup> In other class action contexts, however, the outlook may not be quite as grim. See Robert H. Klonoff, *Class Actions II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971 (2017) (arguing that the decline of the class action has slowed since 2013).

## CONCLUSION

Movements require new ideas, new people—new blood—to survive. Feminism and Title VII class action doctrine both need to harness the wisdom of middle age as well as the ingenuity of a new generation of theorists and litigants. As history has shown, when feminist scholars actively engage the debate surrounding legal procedure and substance—as occurred in early Title VII litigation—courts will listen.<sup>105</sup> Without scholarship that can theorize and translate feminist thought into the language of procedure, however, courts may fill that theoretical vacuum with holdings that indicate judicial doubt about the ongoing existence and severity of sex discrimination in the workplace. As in *Wal-Mart*, courts may presume that women “as women” lack commonality, and that systemic bias is either overblown, a relic of the past, or both.

In addition to offering scholarship that documents the ongoing role of systemic gender discrimination in the American workforce, a robust scholarly defense of Rule 23(b)(2) class actions remains critical to achieving the anti-discrimination goals of Title VII.<sup>106</sup> First, institutional change cannot generally be achieved through individual litigation.<sup>107</sup> Class actions bring public attention to how women are treated in the workplace without placing the full burden of that battle on a single plaintiff.<sup>108</sup> Rule 23(b)(2) class actions, which lack an opt-out mechanism, make it easier for employees to be members of a class without incurring retaliation from their employers. Moreover, Rule 23(b)(2) class actions are particularly important when agencies such as the EEOC are not aggressively pursuing claims, as is likely to be the case following the 2016 presidential election. Second, this form of class action—at least in theory—can effectively provide relief to women who do not have the means to pursue individual litigation. This participatory aspect of Rule 23(b)(2) class actions is not just a practical benefit to women seeking redress, but also a significant democratic one that gives voice to those who might otherwise be marginalized. Finally, Rule 23(b)(2) addresses structural, organizational discriminatory practices through its primary remedy: injunctive relief.

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<sup>105</sup> See *supra* Section II.A, especially note 25 and accompanying text.

<sup>106</sup> See, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and Its Detrimental Impact on Civil Rights*, 92 WASH. U. L. REV. 455, 488 (2014) (“[C]lass actions are part of the Title VII enforcement scheme.”).

<sup>107</sup> See Green, *supra* note 55, at 678 (arguing that “courts are often unwilling to implement organizational solutions for individual discriminatory decisions”).

<sup>108</sup> See *id.* at 673 (arguing that the public attention that comes from discrimination claims, particularly class action claims, may pressure organizations to reform).

Despite a decade or more of backlash against feminism and against class actions, Title VII class actions under Rule 23(b)(2) remain a vital mechanism for eradicating sex discrimination in the workplace. It is possible to describe *Wal-Mart* as a bookend to an era of aggregate gender discrimination law—an era that made only partial progress, leaving many women behind. We hope that a new generation of lawyers, litigants, and scholars will resist that narrative, and will instead reinvigorate the concept of commonality among women.